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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WISCONSIN'S ENVIRONMENTAL DECADE, INC.
and PETER ANDERSON,

Petitioners,

v.

STATE BAR OF WISCONSIN,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRONSON C. LA FOLLETTE
Attorney General of
Wisconsin

LEROY L. DALTON
Assistant Attorney General

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3863

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## STATEMENT OF THE CASE

The Statement of the Case provided by petitioners adequately states a summary of the actions in the district court and court of appeals but partially misstates "but for the filing of this action respondent would have commenced proceedings against petitioners in the Wisconsin courts." (Pet. 6).

As the court of appeals carefully pointed out:

> The State Bar has not, however, followed up this recommendation with a proper attempt to trigger the quo warranto procedure prescribed by Wis. Stat. § 784.04 (1981). Moreover, under this statute it is normally up to the state attorney general, not the State Bar, to proceed against an allegedly unauthorized practioner. The attorney general appears to possess substantial discretion in deciding whether to perform this function. (Pet. Ap. 7a).

Also of significance and not mentioned by the petitioner is the order of the Wisconsin Supreme Court dated June 8, 1981, which denied the petition to commence an original action in the Wisconsin Supreme Court, "without prejudice to commencement of the action in some other appropriate forum" (Pet. Ap. 4a). This was a clear invitation to

petitioners that in order for the Wisconsin Supreme Court to rule on the question whether Peter Anderson's (hereinafter Anderson) activities constituted the unauthorized practice of law in Wisconsin, a complete record should be made in a Wisconsin trial court.

The Wisconsin Supreme Court had held in State ex rel. State Bar of Wisconsin v. Keller, 16 Wis. 2d 377, 114 N.W.2d 796 (1962), vacated on other grounds, 374 U.S. 102 (1963), 21 Wis. 2d 100, 123 N.W.2d 905, cert. denied, 376 U.S. 902 (1964) that lay representation in the adjudicatory proceedings before the Public Service Commission of Wisconsin (hereinafter Commission) was unauthorized practice of law. However, in State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961) the court held that

real estate agents were engaging in the practice of law by drawing deeds and other legal documents related to real estate transactions but did not hold the practices to be unauthorized. In part, the reasoning was that there had been no showing of harm to the public by the long tradition of real estate brokers who are licensed by the State carrying out this function.

As the petition in this court states, the petitioners supported the petition filed with the Wisconsin Supreme Court for an original action. However, petitioners decided not to follow the invitation of the Wisconsin Supreme Court to bring an action in a Wisconsin trial court.

In deciding to forego the Wisconsin litigation petitioner prevented the Wisconsin Supreme Court from deciding the

question whether the complained of practices were unauthorized under Wisconsin law. Rather petitioners reactivated the federal law suit and proceed through the district court and court of appeals to this court on the constitutional issue and became entangled with the ripeness issues.

REASONS FOR DENYING THE WRIT

**I. Case Is Not One Of First Impression In This Court**

Petitioners contend that this case is one of first impression in this court because:

> (a) [T]he State has made a final decision to commence a quasi-criminal proceeding against the plaintiffs and advised them of that intention;
>
> (b) Nothing remains to be done before the State commences that proceeding;
>
> (c) The parties have stipulated to all the relevant

> facts and the defendant has not raised ripeness as a defense;
>
> (d) The effect of the dismissal will be to require the plaintiffs to litigate their First Amendment claims as a defense to a state court proceeding. (Pet. 8).

There is a conflict between the petitioner's contentions in (a) and (b) and what the court of appeals determined to be the facts in the record at this point. It is true that for over ten years the State Bar of Wisconsin has advised Wisconsin's Environmental Decade, Inc. (hereinafter Decade) and Anderson that the State Bar construes Anderson's activities in representing the decade in contested adjudicatory hearings before the Commission to be the practice of law and unauthorized within the meaning of Keller. However, the petitioners herein have been on the offensive since 1977 as

shown by the record discussed by the court of appeals. The State Bar has consistently held to the position that the activities of Anderson violate Wisconsin law, but have been patient and gentle with the petitioners and have cooperated in an effort to have the legal questions presented to the appropriate forum at each step along the eight year path that petitioners have taken in this litigation. The 1977 lawsuit was analyzed by Judge Doyle in his decision and order of August 29, 1978 and he concluded that the threatened enforcement, as shown by the record at that time, did not present a controversy ready for adjudication because the threat was not "substantial, genuine, and imminent" within the meaning of Steffel v. Thompson, 415 U.S. 452, 458-459 (1974). (Pet. Ap. 28a).

At that time Judge Doyle also pointed out that should the State Bar seek legal action against Anderson and the Decade after a study of the entire phenomenon of non-lawyers appearing in representive capacities at state administrative proceedings, the State Bar would give reasonable notice of its intention so that Anderson and the Decade would have an opportunity to return to federal court to seek preliminary injunctive or other relief (Pet. Ap. 27a).

After the investigation of lay practices before state administrative agencies a report was prepared by the unauthorized practice committee suggesting that legal action be brought against Anderson and the Decade for unauthorized practice of law. The Board

of Govenors approved the committee's recommendation on March 8, 1980 and directed that the matter be referred to the attorney general for further action unless the petitioner returned to federal court to challenge the constitutionality of the action. Within the time specified, the petitioners did file the current action in the Western District of Wisconsin seeking a declaration of their first amendment rights. The Bar alleged that the court should abstain pending determination in state court of state law issues related to the constitutional dispute. (Pet. Ap. 14a).

On April 3, 1981, the parties entered into a stipulation staying all proceedings in the district court while an agreed upon petition, exhibits, and a stipulation of facts were filed with the

Wisconsin Supreme Court asking that court to accept the petition as an original matter and to determine whether plaintiffs were engaged in unauthorized practice of law under the laws of the State of Wisconsin. In exchange for the petitioner's agreement to support the petition, the State Bar agreed that if the Wisconsin Supreme Court did not accept the petition, respondent would not oppose the federal court's determination of the constitutional issue. When the Wisconsin Supreme Court denied the petition, the State Bar subsequently on April 19, 1982 filed another petition with the Wisconsin Supreme Court. This petition asked that the rules be amended to, in effect, permit lay representation before administrative agencies provided such persons met minimum qualifications

including licensure, and bringing such activities under the code of professional responsibility applying to attorneys. The court denied that petition on January 19, 1983. (Pet. Ap. 4a).

It is clear therefore that the history of this case demonstrates that the State Bar has not promoted prosecution or even injunction or quo warranto as a remedy but has permitted petitioners to litigate the legal questions involved in forums of their own choosing. It was petitioner's choice to go back to the federal court when the State Supreme Court indicated that the case should be commenced in the State Court System. Therefore the petitioner's contention under (a) above that the state has "made a final decision to commence a quasi-criminal proceeding" is without substantiation in the record.

Equally lacking in substantiation in the record is the contention put forth by petitioner in (b) above that "nothing remains to be done before the state commences that proceeding." As the court of appeals pointed out (Pet. Ap. 7a) the State Bar has not followed up the 1980 recommendation with a request to have the attorney general bring quo warranto or declaratory judgment.[1/] Also as noted by the court of appeals, even if the State Bar had made a formal request to the attorney general for legal action,

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1/ One of Judge Doyle's understandings in granting the motion to dismiss in 1978 was that "if the State Bar decides to seek a declaratory judgment from the state courts, the State Bar will give the plaintiffs reasonable notice of its intentions so that plaintiffs will have an opportunity to return to this court to seek preliminary injunctive or other relief" (Pet. Ap. 27a).

the attorney general has substantial discretion whether to bring the legal action suggested. The court of appeals correctly declined to find that legal action against Anderson and the decade is "certainly impending" within the meaning of Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979) and Steffel v. Thompson, 415 U.S. 452 (1974).

## II. Principal Purpose Of Ripeness Doctrine Is To Avoid Premature Decisions On Important Questions

The record in this case demonstrates a patience and forebearance on the part of the State Bar to allow legal questions be resolved rather than any desire to punish the petitioners. Therefore, not only are petitioners mistaken in their contentions that the state has made a final decision to commence a "quasi-criminal proceeding" against them but

they are also in error in contending that nothing remains to be done before the state commences that proceeding. The record in fact speaks clearly that there has never been talk of a criminal or quasi-criminal action to determine the legal questions in this case. When speaking of the "state" the petitioners must include the attorney general in any such grouping. Not only has the attorney general not been formally requested to bring legal action but of course since he has not been asked, there has been no decision made as to what, if any, type of legal action would be brought if a formal request was made.

Petitioners contend that this court should entertain the federal constitutional issue because it is clear that the Wisconsin Supreme Court has held

similar conduct to be the unauthorized practice of law in Keller. However, as the court of appeals pointed out, it is quite possible that the Wisconsin Supreme Court might find Keller distinguishable. The final authority on what is the unauthorized practice law in Wisconsin rests with the Wisconsin Supreme Court as was pointed out in Dinger. The court of appeals noted:

> That court has approached such questions on a case-by-case basis, with great solicitude for the speech and associational rights that may be affected by its rulings. See e.g. Hopper v. City of Madison, 79 Wis. 2d 120, 256 N.W.2d 139, 145 (1977); Dinger, 109 N.W.2d at 691-92 (public interest and convenience weighed in determining whether to permit practice challenged by State Bar). Until the Wisconsin courts issue some controlling decision, we would not be justified in concluding that Anderson's activities as stipulated definitely constitute unauthorized practice as a matter of state

> law. Hence, we cannot discount the possibility that the purported controversy concerning the constitutionality of Wisconsin's unauthorized practice law may prove to be nonexistent (Pet. Ap. 9 A, 10 A).

Petitioners had the choice once the Wisconsin Supreme Court suggested commencing the action in "some other appropriate forum" to seek a declaration in a trial court in Wisconsin. The petitioners explained that they chose not to take that route because they did not want to "proceed through two courts before reaching the Wisconsin Supreme Court" (Pet. p. 5). Sec. 809.60 of the Wisconsin Statutes permits the bypassing of the court of appeals in certain cases and had the petitioners taken the state court route, they could have avoided both

the ripeness issue and the abstention issue recognized by Judge Doyle in his 1978 decision (Pet. Ap. 27a, n. 2) and possibly have gone directly from the trial court to the Wisconsin Supreme Court. The issue is now before this court without the benefit of the Wisconsin Supreme Court determination.

Petitioner contends that there is presented an important question of federal law which has not been, but should be, settled by this court. The record, however, shows that petitioners have failed to establish that the state has made a final decision to commence legal actions against them and this court should not make a premature decision without a determination by the Wisconsin Supreme Court that petitioner's conduct

is in violation of Wisconsin law. Therefore, certiorari should be denied to avoid a premature decision on an important question. Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

## IF ISSUE IS RIPE, THIS COURT SHOULD DECIDE THE CONSTITUTIONAL QUESTION

Petitioners urge the court to decide the scope of the petitioner's first amendment rights in accordance with the discretion set out in Singleton v. Wulff, 428 U.S. 106, 121 (1976).

The respondent's position is that if the court grants certiorari, and then determines that the case is ripe for determination that this court should not remand the case but should resolve the constitutional question.

## CONCLUSION

Therefore, the petition for a writ of certiorari should be denied. If the writ is granted and the court decides the ripeness issue in favor of the petitioners, the court should also decide a constitutional issue.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of
Wisconsin

LEROY L. DALTON
Assistant Attorney General

Attorneys for Respondent

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Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3863